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Fourth Amendment Applicability

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Fourth Amendment Applicability

Abstract

A large percentage of fourth amendment litigation involves the issues of applicability to place, waiver/consent, and the reasonable expectation of privacy. Not one of these issues, however, has the remotest thing to do with the ultimate substance of the fourth amendment protection itself. They deal exclusively with the threshold question of whether the fourth amendment is even involved. Only if it is, do the actual requirements of the fourth amendment become material. This article examines the applicability of the fourth amendment prohibition against unreasonable search and seizures with respect to these common issues.

Keywords

Fourth amendment, search, law enforcement, criminal procedure, constitutional rights, constitutional law, Katz v. United States, state action doctrine, warrants

Disciplines

Constitutional Law | Criminal Law

Comments

This article is co-authored by the Honorable Charles E. Moylan, Jr., Associate Judge of the Maryland Court of Special Appeals

FOURTH AMENDMENT APPLICABILITY

CHARLES E. MOYLAN, JR.[†]
JOHN SONSTENG^{††}

INTRODUCTION	209
I. INAPPLICABILITY AS TO PLACE.....	217
II. INAPPLICABILITY AS TO THE TRESPASSER	230
III. INAPPLICABILITY AS TO THE VICTIM	235
IV. WAIVER OF FOURTH AMENDMENT PROTECTION/ CONSENT	243
V. WHEN THE FACTS DON'T FIT THE MODEL: THE REASONABLE EXPECTATION OF PRIVACY.....	244
CONCLUSION	246

INTRODUCTION

There is a deceiving similarity between an instance of the fourth amendment inapplicable and an instance of the fourth amendment satisfied if one looks only at the end result. When the fourth amendment is either inapplicable or satisfied, the state prevails at the suppression hearing and the smoking gun is received in evidence. When we proceed, however, from the practical question of, "What is the result?" to the more intellectually tantalizing question of, "How did we arrive at that result?" all resemblance ceases. In terms of their controlling factors, there is no overlap between the deceptively similar concepts.

When the fourth amendment is satisfied, constitutional liberty is vindicated and all is right with the world. A determination of fourth amendment satisfaction involves a consideration of a matrix of values involving such things as warrants, oaths

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and affirmations, particularity of description, probable cause, exigency, good faith on the part of police, and the sanctity of the threshold of the home. There is a reassuring sense that good things are constitutional and that bad things are unconstitutional and that right will ultimately prevail.

When, however, the fourth amendment is inapplicable, distinctions between good and evil and between right and wrong are irrelevant. Probable cause has no advantage over a fishing expedition; particularity of description has no advantage over a general rummaging about; exigency has no advantage over investigative laziness; and good faith has no advantage over bad faith. When the fourth amendment does not apply, moral considerations are immaterial and should not be injected into the analysis. This cold logic is unsettling. We often fall back on moral considerations and muddy the waters of understanding by refusing to recognize frankly that where the fourth amendment is inapplicable, the law does not give a constitutional damn about noncompliance. We too frequently lack the courage of conviction to say, "So what?" That simple phrase candidly points out that the immaterial is immaterial.

As we approach an arguable fourth amendment problem we should always ask two elemental questions: (1) Is it applicable? (2) Has it been satisfied? Lurking in parentheses between should be the clear command: (Do not, repeat, do not go on to question #2 unless the answer to question #1 is, "Yes.>"). There is a profound difference in character between the issues of applicability and satisfaction, but the human tendency to moralize often blurs the distinction.

If the answer to the first question is, "Yes, the fourth amendment does apply," then we are, and ought to be, deeply involved in the substance of constitutional satisfaction. We need to know whether there was a search and seizure warrant and, if so, whether it was adequate in all essential respects. We need to know whether there was probable cause for appropriate warrantless activity. We need to know if there was an exigency so as to excuse the nonprocurement of a warrant. We need to know if the police officer was acting in good faith.

If, on the other hand, the answer to the first question is, "No, the fourth amendment does not apply," then we do not, and ought not, trouble ourselves with such useless considerations. Compliance versus noncompliance is a meaningless dis-

inction “out there” where there is no fourth amendment either to be violated or to be satisfied. Claims that there was no probable cause, no exigency, no good faith, etc., should not provoke, as they inevitably do, the reflexive response, “Oh, yes there was,” but the infinitely more appropriate reply, “So what?”

We can accept in theory that there are places and situations to which the fourth amendment does not apply. Describing the limits of the fourth amendment is very different from defining the values of the fourth amendment. We need reminding periodically that those values of the fourth amendment and the sanction of the fourth amendment reach only as far as the amendment itself reaches.

Imagine a hypothetical suppression hearing in which a judge must determine if evidence should be admissible in a trial. The defendant, a notorious spy, is accused in Washington, D.C., of espionage in that he allegedly turned over the plans for the hydrogen bomb to the Red Chinese while serving in various American embassies abroad. Two incriminating communications authored by the defendant will be offered in evidence by the government. One was turned over to American authorities by agents of Scotland Yard who recovered the document from a cottage owned by the defendant in the Cotswolds Hills of southwestern England. The second document was turned over to American authorities by agents of the Russian KGB who recovered it from the Crimean dacha owned by the defendant on the shore of the Black Sea. Both the cottage in the Cotswolds and the dacha on the Black Sea were searched warrantlessly. Neither Scotland Yard nor the KGB was acting on behalf of the American government. Both documents will, of course, be received in evidence over the defendant’s fourth amendment objections, because the fourth amendment coverage does not extend to either the Cotswolds or the Black Sea coast and does not regulate the behavior of either Scotland Yard or the KGB.

Once we recognize that the two situations are beyond the reach of the fourth amendment, we should also recognize that describing the boundaries of the fourth amendment is not a function of our moral approval or disapproval. We do not receive the document from the Cotswolds because of our belief that the lads from Scotland Yard are essentially decent chaps who always act with civilized restraint, but because their meth-

ods are none of our business. If the fourth amendment does not cover their actions, neither does it cover the actions of the essentially indecent chaps of the KGB who wrenched the key to the dacha from the broken body of the defendant. We can only demand that the evidence itself be trustworthy.

The outer limits of the fourth amendment's geographical coverage actually fall far short of the Cotswolds or the Black Sea coast. A lot closer to home, what is fourth amendment inapplicability? There are at least four broad varieties of fourth amendment inapplicability or noncoverage: (1) noncoverage of the place searched; (2) noncoverage of the trespassing searcher; (3) noncoverage of the victim of the search; and (4) noncoverage by virtue of the protection having been waived.

Several illustrations from the pages of familiar literature may help to map the territory. Because distance in both space and time facilitates perspective, let the place be Old Bailey and the time, 1881. Several fictional assumptions are necessary. Assume that England is in deep financial troubles following the second Afghan War and Whitehall turns in desperation to Washington. England is annexed as the thirty-ninth state of the American Union, with Queen Victoria remaining on as local governor. With a prescience not possessed by the late colonials, English judges are able to anticipate the Supreme Court decisions of *Wolf v. Colorado*,¹ *Mapp v. Ohio*,² and *Ker v. California*³ before President Garfield is cold in his grave. Against this backdrop, five prisoners stand in the dock demanding their newly acquired rights under the fourth and fourteenth amendments.

(1) *Noncoverage of the Place Searched*: Regina v. Mrs. Henry Stapleton, Widow.⁴ The prisoner stands accused of (a) accessoryship with her now deceased husband in the murder of Sir Charles Baskerville, (b) conspiracy to murder Sir Charles Baskerville, and (c) petit larceny of a chattel, to wit, one used left boot, from the said Sir Charles Baskerville. The prisoner complains that a private detective named Holmes, working with In-

1. 338 U.S. 25 (1949) (fourth amendment is applicable to the states).

2. 367 U.S. 643 (1961) (the exclusionary rule will be used to enforce the fourth amendment).

3. 374 U.S. 23 (1963) (fourth amendment will apply to the states just as it does to the federal government).

4. Inspired by Sir Arthur Conan Doyle's *THE HOUND OF THE BASKERVILLES*, originally published in 1901-02.

spector Lestrade of Scotland Yard, warrantlessly searched a hut and an enclosed tunnel on property belonging to the late Henry Stapleton. It was brought out that although the hut and tunnel were upon the Stapleton property, they were not within the actual curtilage of Merripit House. Mrs. Stapleton additionally complains that the boot was only discarded by her late husband as he was being warrantlessly chased by Holmes to his untimely death in Grimpen Mire. Asked to comment upon the failure of Holmes to obtain a warrant and the lack of exigency by way of exemption from that requirement, Queen's Counsel triggers the following exchange:

Queen's Counsel: "If it please your lordship, so bloody what?"

Lord Chief Justice: "It does not please my lordship. Your response betrays you as an insensitive zealot but your logic is deplorably impeccable. The motion to suppress is reluctantly denied."

The Lord Chief Justice goes on to coin the phrase "dropsy case" to explain his ruling with respect to the discarded boot. He predicts that the streets of America will one day be littered with abandoned glassine bags even as the Grimpen Mire was littered with Sir Henry's footwear. He explains, moreover, that the writ of the fourth amendment does not run either to curbside or to bogside.

With respect to the enclosed hut and tunnel, His Lordship explains that notwithstanding the unconscionable trespass of Holmes upon private property, the fourth amendment does not extend beyond the curtilage, citing the "open moors" doctrine of *Hester v. United States*.⁵ The fourth amendment is simply inapplicable to these places.

(2) *Noncoverage of the Trespassing Searcher*: Regina v. Charles Augustus Milverton.⁶ The prisoner, miraculously recovered from seemingly lethal gunshot wounds, is on trial for blackmailing. The investigative methods were unbelievably reprehensible. Detective Holmes had initially posed as a plumber and insinuated himself into the good graces of Milverton's servant girl by pretending affection for her and engaging himself to be married. By virtue of this artifice, he en-

5. 265 U.S. 57 (1924) (the fourth amendment does not cover "open fields").

6. Inspired by Sir Arthur Conan Doyle's *THE ADVENTURE OF CHARLES AUGUSTUS MILVERTON*, originally published in 1904.

tered and "cased" Milverton's home of Appledore Towers, Hampstead. Following that "casing," he returned in the dead of night warrantlessly, donned a black silk mask, used a glass cutter to gain entrance to the dwelling and with professional burglar's tools, broke into a living room safe to procure the evidence he turned over to Scotland Yard. His cavalier attitude toward the Constitution was revealed when his accomplice, Dr. John Watson, testified under a grant of immunity to his words: "You know, Watson, I don't mind confessing to you that I have always had an idea that I would have made a highly efficient criminal. This is the chance of my lifetime in that direction."

As Watson himself characterized their warrantless entry, "An instant afterwards he had closed the door behind us, and we had become felons in the eyes of the law." It was, however, developed that Holmes on this occasion was acting not for Scotland Yard but exclusively for a private client, Lady Eva Brackwell. When asked to comment upon the shameless investigative procedure, Queen's Counsel ignited the following exchange:

Queen's Counsel: "If it please your lordship, so bloody what?"

Lord Chief Justice: "It displeases my lordship mightily. You are an inhumane lout but your legal position is irrefutable. The motion to suppress is angrily denied."

The Lord Chief Justice goes on to explain that the fourth amendment reaches only the activities of agents of government and not of private persons, citing *Burdeau v. McDowell*.⁷ The fourth amendment is simply inapplicable to private persons.

(3)(a) *Noncoverage of the Victim of the Search*: Regina v. Colonel Sebastian Moran.⁸ Colonel Moran is on trial for the murder of Ronald Adair and for the attempted murder of Mr. Sherlock Holmes. All of the physical evidence and all of the eyewitness testimony against Colonel Moran was procured by virtue of Holmes's warrantless trespass into Camden House, No. 32 Baker Street, directly opposite 221B. Colonel Moran complains additionally that Holmes aggravated this trespass by

7. 256 U.S. 465 (1921) (fourth amendment regulates only governmental agents and not private persons).

8. Inspired by Sir Arthur Conan Doyle's *THE ADVENTURE OF THE EMPTY HOUSE*, originally published in 1903.

physically assaulting him. It is, however, developed that Colonel Moran was himself a trespasser in the said Camden House. Asked to comment upon Holmes' unorthodox methods, Queen's Counsel launched the following exchange:

Queen's Counsel: "If it please your lordship, so bloody what?"

Lord Chief Justice: "It certainly does not please my lordship. You are a callous Philistine but your argument is sound. The motion to suppress is sadly denied."

The Lord Chief Justice goes on to explain that just as a thief has no fourth amendment protection in the enjoyment of a stolen carriage, citing *Palmer v. State*,⁹ neither does a trespasser have fourth amendment protection in an invaded dwelling, citing *Brooks v. State*.¹⁰ The fourth amendment is simply inapplicable to such persons and they have no standing to complain.

(3)(b) *Noncoverage of the Victim of the Search*: Regina v. Valentine Walter.¹¹ The prisoner stands accused of high treason for having attempted to turn over to a foreign power the Bruce-Partington plans for a new and advanced submarine. Holmes on this occasion was working directly for the British Government. To procure the physical evidence now offered against the prisoner, Holmes without a warrant vaulted a garden wall in order to burglarize the home of one Hugo Oberstein at 13 Caulfield Gardens, Kensington.

Dr. Watson, again testifying under a grant of immunity, described the breaking: "Holmes set to work upon the lower door. I saw him stoop and strain until with a sharp crash it flew open." He went on to describe the ransacking of the interior: "Swiftly and methodically Holmes turned over the contents of drawer after drawer and cupboard after cupboard." He described how Holmes discovered a small tin cash box upon a writing desk and then "pried it open with his chisel." There was neither warrant nor probable cause. Watson described his challenging of Holmes on this issue:

9. 14 Md. App. 159, 286 A.2d 572 (1972) (defendant does not have standing to challenge the search of a stolen automobile).

10. 13 Md. App. 151, 282 A.2d 516 (1971) (defendant was not entitled to fourth amendment protection after trespassing onto premises for the purpose of theft).

11. Inspired by Sir Arthur Conan Doyle's THE ADVENTURE OF THE BRUCE-PARTINGTON PLANS, originally published in 1908.

"Could we not get a warrant," inquired Watson, "and legalize it?"

"Hardly on the evidence," said Holmes.

"What can we hope to do?"

"We cannot tell what correspondence may be there."

"I don't like it, Holmes."

"Watson, my dear fellow, you shall keep watch in the street. I'll do the criminal part. It's not a time to stick at trifles."

Ordered to comment upon this behavior, Queen's Counsel detonates the following exchange:

Queen's Counsel: "If it please your lordship, so bloody what?"

Lord Chief Justice: "It infuriates my lordship. You are a Mephistopheles of the common law but your position is diabolically correct. The motion to suppress is apoplectically denied."

The Lord Chief Justice explains that whatever the constitutional ravages against Hugo Oberstein, Valentine Walter may not vindicate the constitutional right of someone else, citing *Brown v. United States*.¹² The burgled house was Oberstein's and Walter had no interest in it. Walter utterly lacked standing and the fourth amendment was, therefore, inapplicable to him.

(4) *Noncoverage by Virtue of the Protection Having Been Waived*: Regina v. Rachel Howells.¹³ The prisoner stands accused of the murder of one Richard Brunton and of the attempted larceny of the ancient Musgrave treasure. She objects that the evidence against her, including both the treasure and the body of Brunton, was recovered by Holmes in the course of the warrantless search of Hurlstone Manor in which she was a live-in servant. It was developed, however, that Holmes was there with the consent of the owner of Hurlstone Manor, Sir Reginald Musgrave. Still perturbed at the unorthodox methods of the world's greatest detective, the Lord Chief Justice implores

12. 411 U.S. 223 (1973) (defendant does not have standing to challenge the admission of evidence under a defective warrant when the defendant is unable to establish a "legitimate expectation of privacy" or interest of any kind in the premises searched or goods seized).

13. Inspired by Sir Arthur Conan Doyle's *THE MUSGRAVE RITUAL*, originally published in 1893.

Counsel for the Crown to offer some explanation. Queen's Counsel incites the final exchange:

Queen's Counsel: "If it please or displease your lordship, so bloody what?"

Lord Chief Justice: "Indeed, so what! A thousand times so what! I am appalled by your man's methods but I am powerless to suppress probative evidence when the situation is beyond the reach of the fourth amendment. Once again, the motion to suppress is frustratingly denied, you clever but heartless dog."

The Lord Chief Justice went on to explain that although Rachel Howells lived at Hurlstone Manor the fourth amendment coverage may be waived when one having authority to consent, citing *United States v. Matlock*,¹⁴ does voluntarily consent by the appropriate voluntariness standard, citing *Schneckloth v. Bustamonte*.¹⁵ The fourth amendment is inapplicable to Rachel Howells.¹⁶

Although the law's actual development was slower and more prosaic on this side of the water, it was unerringly parallel. "Out there" where the fourth amendment does not apply, noncompliance with an inapplicable standard is an immateriality. No appliance, no compliance!

I. INAPPLICABILITY AS TO PLACE

The problem is one of location. The fourth amendment does not apply "out there." Where is "out there?" As it turns out, there are several "out theres." In 1924 the Supreme Court told us that "open fields" were "out there." The case was *Hester v. United States*.¹⁷

14. 415 U.S. 164 (1974) (consent to search, by one having authority to consent, is binding upon all others).

15. 412 U.S. 218 (1973) (voluntariness is the standard for valid consent).

16. The eminently logical, albeit outraged, Lord Chief Justice offered the further observation that even if the fourth amendment were applicable, it is extremely doubtful if the exclusionary rule would have any deterrent efficacy as to Holmes. In this regard, he noted Holmes's express statement as to the driving force behind his investigations—made after he had sent an unquestioned felon upon his way rather than proceed to the trial table—and as recorded by Dr. Watson in *THE ADVENTURE OF THE BLUE CARBUNCLE* (1892): "Chance has put in our way a most singular and whimsical problem, and its solution is its own reward." "Why lose good evidence," the Lord Chief Justice shrewdly observed, "if nothing is to be gained in return?"

17. 265 U.S. 57 (1924). In a recent case, the United States Supreme Court held that Mexico was "out there." In *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056,

Charlie Hester was convicted of concealing distilled spirits. Revenue officers observed Hester and a man named Henderson handling several bottles, jars, and jugs, by a car near Hester's house. When an alarm was finally given signalling the approach of the revenue officers, Hester and Henderson both ran. A bottle, a jar, and a jug were thrown away by the fugitives and they broke. Revenue officers recovered the broken shards and enough liquid remaining therein to prove the case. Hester objected that the revenue officers were trespassers and that both their testimony and the physical evidence should be suppressed.

It was conceded that the officers had no warrant for a search or for an arrest. Justice Holmes, speaking for the Court, rejected the challenge to the testimony even if an unwarranted trespass be assumed: "[I]t being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure."¹⁸ The Court dismissed the challenge to the seizure of the jug, jar, and bottle on the theory of abandonment. Justice Holmes wrote, "[T]here was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned."¹⁹

The more significant portion of the *Hester* opinion is that wherein Justice Holmes clearly states that the coverage of the fourth amendment does not extend to the open fields, even where the open fields are those of the defendant or his family and even where the revenue officers are unquestioned trespassers. Holmes thus articulated:

This evidence was not obtained by the entry into the house and it is immaterial to discuss that. . . . The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open

1066 (1990), the Court held the fourth amendment did not apply to the search of a Mexican citizen's residence by American authorities.

18. *Id.* at 58.

19. *Id.*

fields. . . .²⁰

The message of *Hester* was clear. The Court did not remotely suggest that the fourth amendment had been satisfied. Indeed, it had not. There was no warrant for a search or for an arrest. There was no suggestion of any exigency exempting the revenue officers from the warrant requirement. There was no establishment of probable cause. The clear teaching of *Hester* is rather, that in the open fields, the fourth amendment is inapplicable and that noncompliance with its dictates is, therefore, immaterial.

Thus was born what came to be called the "Open Fields Doctrine." This doctrine does not constitute an exception to the warrant requirement. The warrant requirement, with its carefully drawn exceptions, is a way of satisfying the fourth amendment. The "Open Fields Doctrine" is, by way of contrast, an exemption from any obligation to satisfy the fourth amendment. It is a classic instance not of the "fourth amendment satisfied" but of the "fourth amendment inapplicable."

What emerged from *Hester v. United States* was, moreover, a recognition of a "constitutionally protected perimeter," defining in a geographic sense the protection of the fourth amendment. Within that perimeter, the fourth amendment applies and must be satisfied; beyond that perimeter, there is no obligation to satisfy the fourth amendment. In terms of private real property, the home itself and the extended home (called curtilage) are within the protected perimeter; the rest of the real property is not.

In terms of a clear-cut recognition that there are certain places which are not constitutionally protected and are not, therefore, immune from investigative trespass, a cloud appeared on the horizon in the form of *Katz v. United States*.²¹ Seven hallucinogenic little words, wrenched from their factual moorings, threatened to cut adrift the earlier understanding of the fourth amendment's limitations. Those words were, "[T]he fourth amendment protects people, not places."²² Standing alone, they appeared unnerving and many courts went berserk under their intoxicating influence. A closer reading of *Katz*, however, should have dispelled the alarm.

20. *Id.* at 58–59.

21. 389 U.S. 347 (1967).

22. *Id.* at 351.

The confusion that resulted from the *Katz* decision sprang from the failure to remember one of the most fundamental characteristics of the common law. When we follow earlier decisions, theoretically we are following only the decision itself and not necessarily the opinion that announces the decision. The opinion is, in theory, only evidence of the underlying decision. When the language of the opinion is broader than necessary to explain the actual decision, the narrow decision rather than the broad language is the controlling law. In the *Katz* case, the decision itself was relatively narrow but the language announcing it was dangerously broad.

In the wake of *Katz*, many creative trial judges and defense lawyers, in their desire to broaden individual protection, read the language about the fourth amendment protecting people and not places to mean that the fourth amendment had moved from inside a well-defined constitutionally-protected perimeter to the broad outside.²³ The facts of the *Katz* case, however, do not support such a broad reading for the obvious reason that the defendant, Charles Katz, was actually inside a constitutionally-protected perimeter when his conversation was electronically intercepted.²⁴

FBI agents had reason to believe that Katz was a gambler who called in his "action" at a set time every afternoon from the same public telephone booth on Sunset Boulevard in Los Angeles. From a check of telephone company records, it was discovered that some of the calls were made to a number in Massachusetts which was listed under the name of a person who was known as a gambler. Without a warrant, the agents placed an electronic listening device on the roof of the telephone booth and were able to intercept the incriminating conversation of Katz. The tapes from the telephone booth were used as part of the basis for a search warrant obtained to search the apartment of Katz. Katz was arrested and convicted of transmitting wagering information by telephone in violation

23. See, e.g., *United States v. Kim*, 415 F. Supp. 1252, 1255 (D. Haw. 1976) (quoting *Katz*, 389 U.S. at 353) ("After *Katz*, the concept of curtilage and the presence or absence of a physical intrusion can have 'no constitutional significance' in determining whether or not a search has taken place."); *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), *vacated*, 409 U.S. 33, 35 (1972) (state court decision that defendants who put trash next to the street for pickup did not forsake their expectations of privacy vacated by Supreme Court).

24. *Id.* at 352.

of a federal statute. He sought to suppress the evidence of the phone calls because they were illegally seized by the electronic listening device. The controlling precedents were *Olmstead v. United States*²⁵ and *Goldman v. United States*,²⁶ wherein the Supreme Court had held that the fourth amendment was not applicable unless there was an actual, physical penetration into a constitutionally-protected area. There was no question about the fact that the telephone booth, for the period of its use and occupancy, was a constitutionally-protected area as far as Katz was concerned. Because the electronic eavesdropping device on the roof, however, did not literally penetrate into the structure of the booth, the fourth amendment, under the controlling precedents, was not even applicable.

In flatly overruling *Olmstead* and *Goldman*, the Supreme Court pointed out that what is being protected within a constitutionally-protected area is the privacy of the person on the inside and not the structural integrity of the building—the brick, the woodwork, the stucco. The problem with which the Court had to come to grips was very clear: “Once this much is acknowledged, and once it is recognized that the fourth amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”²⁷ The actual holding of *Katz* was also clear:

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling. . . . The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.²⁸

The Supreme Court did not abandon the notion of the “constitutionally-protected area” but simply held that that notion alone is not always sufficient to dispose of the fourth amendment problem. The Court said: “[T]he correct solution of fourth amendment problems is not *necessarily* promoted by in-

25. 277 U.S. 438 (1928).

26. 316 U.S. 129 (1942).

27. 389 U.S. at 353.

28. *Id.*

cantation of the phrase 'constitutionally-protected area.' ”²⁹ *Katz* did not expand the places protected but did expand the power to review the means by which the trespasses into those places were effected. Within this context, the emphasis upon “people, not places” becomes clear. Within the constitutionally-protected area, it is the person and that person’s legitimate expectation of privacy which is to be protected against such sophisticated but non-penetrating devices as laser beams and parabolic microphones rather than the physical integrity of the structure being protected against such old-fashioned penetrating devices as jimmies, crowbars, glass cutters, and “spike mikes.” The problem, of course, is that once those seven virulently contagious words escaped Pandora’s box, it took a Herculean labor to get them back again.

As an assist in that Herculean labor, footnote eight of the *Katz* opinion indicated that the “open fields” doctrine was still in good health: “In support of their respective claims, the parties have compiled competing lists of ‘protected areas’ for our consideration. It appears to be common ground that a private home is such an area, *Weeks v. United States*, but that an open field is not. *Hester v. United States*.”³⁰

Justice Harlan’s concurring opinion, moreover, reaffirmed that on the issue of fourth amendment coverage, the notion of “place” was still vitally important: “As the Court’s opinion states, ‘the fourth amendment protects people, not places.’ The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a ‘place.’ ”³¹

Many lawyers and judges, however, continued to interpret the rhetoric of *Katz* in its broader sense. It was not until the 1984 decision in *Oliver v. United States*³² that the apparent conflict between *Hester* and *Katz* was resolved. In the *Oliver* case, Kentucky police officers and federal narcotics agents received reports that marijuana was being raised on the farm of Ray E. Oliver. Narcotics agents and Kentucky state police went to the farm to investigate. When they got to the farm they drove past Oliver’s house to a locked gate which had a “No Trespassing”

29. *Id.* at 350 (emphasis added).

30. *Id.* at 351 n.8 (citations omitted).

31. *Id.* at 361 (Harlan, J., concurring).

32. 466 U.S. 170 (1984).

sign. A path led around one side of the gate. The officers walked around the gate and along the road for several hundred yards. They passed a barn and a parked camper. At that point, someone who was standing in front of the camper shouted, "No hunting is allowed, come back up here!" The officers shouted back that they were Kentucky State Police officers and returned to the camper but did not find anyone. They resumed their investigation of the farm and found a field of marijuana, which was located over a mile from Oliver's home. Oliver was arrested and indicted for manufacturing a controlled substance. He sought to have the evidence of the discovery of the marijuana field suppressed.

Oliver held that the *Katz* decision had not expanded the geographic coverage of the fourth amendment beyond the home and curtilage.³³ The Court pointed out, moreover, the danger of taking words such as "the fourth amendment protects people, not places," out of context.³⁴ Although those words had been the basis for many judges and lawyers to conclude that fourth amendment coverage had moved from inside the constitutionally protected perimeter to the broad outside, the actual facts of *Katz* were far more narrow.

A concept that was alluded to in passing in the *Hester* decision and was developed more fully in the *Oliver* decision was that of curtilage. It is a concept that was readily understood by an earlier, more agrarian society but which needs explaining to people of the twentieth century. We have long recognized a zone of protection against both the private invader and the governmental invader that reaches beyond the four walls of the house itself. Even beyond the house proper, some of our outside land is protected just as surely as is the home itself. Some, however, is not. Where shall the line be drawn?

The notion of curtilage and the analogy between the depredations of the private invader whose unwanted entry is a criminal act and those of the governmental invader whose entry violates a constitutional right are precision instruments for mapping the boundary between a mere trespass, on the one hand, and a burglary or fourth amendment violation, on the other. The sanction of the constitutional exclusionary rule does not protect us in all our broad domains. If we are cattle

33. *Id.* at 180.

34. *Id.* at 181-82.

barons and own half the State of Montana, the coverage of the fourth amendment does not run as far as our barbed wire may run.

There has traditionally, however, been a zone of habitation—a family living area—in which we enjoy a higher degree of protection from either the private invader or the governmental invader. It is protected not because it is our property but because it is both our property and our living area. This living area—called the curtilage—was readily discernible when the kitchen, the laundry, the springhouse, the woodshed, and most particularly the “outhouse,” were not within the four walls of the mansion house. A man of the nineteenth century, after having had too much hard cider, had the same right to resent being surprised by an intruder at 3:00 a.m. as he walked down the garden path to the privy as a man of the twentieth century, after having had too many banana daiquiris, has a right to resent being surprised by an intruder at 3:00 a.m. as he walks down the hall to the bathroom. The expectation of privacy is a constant; only the location of the “facility” has changed. Along the hallway or the garden path, the resentment will be keen whether the intruder is Freddie the Footpad or Special Agent O’Hara. The zone of inviolate privacy is unchanging whether the criminal law is protecting us from the private invader or the constitutional law is protecting us from the public invader.

Although the perception of the curtilage is becoming increasingly ambiguous under the cultural shock of the urban revolution, to the extent to which it is still perceptible it illuminates and informs the analogy between the protections we are afforded within that curtilage by the criminal law and by the constitutional law, respectively. The difference is not in the bounds of the protected area but rather in the classes to which the invaders of that area belong and in the sanctions which can be brought to bear upon those classes. Only by appreciating this fundamental notion can we appreciate that the “open fields” limitation upon the coverage of the fourth amendment makes preeminently good sense.

To one without a sense of history, to say that the enterprising lawman on the trail of the impecunious nephew who has suddenly and strangely come into a fortune may, upon the barest of hunches, dig for the body of Uncle Abner in the cornfield but not dig for the body of Uncle Obadiah beneath the

patio may seem to be the drawing of an artificial and senseless boundary.³⁵ It is, however, the recognition of a core value which abides (or once abided) within the curtilage but is not spread thinly o'er hill and dale even when hill and dale are fenced and posted.

In 1986, the Supreme Court, in *California v. Ciraolo*,³⁶ affirmed that the curtilage of a home, as well as the home itself, falls within the potentially constitutionally protected perimeter. The curtilage was not, however, protected from being viewed from a public place. In this case, the Santa Clara Police received an anonymous tip that Ciraolo was growing marijuana in his back yard. Ciraolo's back yard was completely enclosed by a six-foot high outer fence and part of it by a ten-foot high inner fence. Police officers, assigned to investigate this tip, obtained a private plane and flew over the neighborhood. Flying over Ciraolo's home at an altitude of 1,000 feet, the officers identified the marijuana growing in the fenced-in back yard and took photos. They used both the photos and an affidavit from the anonymous informant to obtain a search warrant to search Ciraolo's home. Ciraolo sought to suppress the discovery of the marijuana.

Upon these facts and relying on the "reasonable expectation of privacy test" from *Katz*, the Court held that the curtilage did not enjoy a reasonable expectation of privacy from the overflight by a police airplane.³⁷ The Court reasoned that since the plants were observed from "public navigable airspace, . . . in a physically nonintrusive manner," the defendant's "expectation of this his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."³⁸

In 1987, in the case of *United States v. Dunn*,³⁹ Drug Enforcement Administration officials and a police officer made a warrantless entry onto the ranch property of Ronald Dunn, upon

35. Substitute the body of a seventeen-year-old girl for those of Uncles Abner and Obadiah and one may read with great interest and great profit *United States ex rel. Saiken v. Bensinger*, 489 F.2d 865 (7th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974). Whether the secret grave lay within the curtilage or "out there" in the "open fields" is still the critical issue for fourth amendment purposes.

36. 476 U.S. 207 (1986).

37. *Id.* at 211-15.

38. *Id.* at 213-14. *See also* *Florida v. Riley*, 109 S. Ct. 693 (1989).

39. 107 S. Ct. 1134 (1987).

their suspicion of illicit drug activity. They crossed over a perimeter fence and an interior fence and stood midway between Dunn's residence and two barns. Here the officials smelled a drug-like odor coming from the direction of the barns and proceeded to the smaller barn. Looking in the window, they saw only empty boxes. Crossing more barbed wire and a wooden fence, the officials reached a second and larger barn, peered into it by shining a flashlight and confirmed the presence of a drug laboratory. With this information, they were able to obtain a search warrant for Dunn's ranch. They returned to the ranch with the warrant, arrested Dunn and seized chemicals and equipment as well as bags of amphetamines they discovered in a closet in the house.

Dunn sought to have the evidence which was seized pursuant to the warrant suppressed because the warrant had been issued based on information obtained during the officers' unlawful, warrantless entry onto Dunn's ranch. In its holding, the Supreme Court listed some of the guidelines to be considered in determining whether a given spot on private property falls within the curtilage.⁴⁰ In *Dunn*, the area immediately surrounding a barn was determined not to be within the curtilage of the farmhouse. Among the factors considered were: the distance of the spot from the farmhouse (in that case sixty yards); the position of the spot in relation to a curtilage fence (it was fifty yards beyond the curtilage fence surrounding the farmhouse); and the type of use to which the spot was being put (the barn was being used for the commercial manufacturing of illicit drugs and not for any family-related purpose).⁴¹

Just as the "open fields" doctrine makes clear that even all private property does not necessarily fall within the geographic coverage of the fourth amendment, two recent decisions dealing with "beeper" tracking devices have distinguished between the public domain, where one has no fourth amendment expectation of privacy, and the home, where one does.

The 1983 decision *United States v. Knotts*⁴² dealt with police monitoring of a "beeper" tracking device which was hidden in a drum of chloroform sold to one of three codefendants. When the Minnesota Bureau of Criminal Apprehension re-

40. *Id.* at 1139.

41. *Id.* at 1140.

42. 460 U.S. 276 (1983).

ceived a report that a 3M Company employee, Tristan Armstrong, was fired for stealing a chemical essential to the manufacture of amphetamines, a Bureau agent followed Armstrong's activity and further observed him buying chemicals from Hawkin's Chemical Company in Minneapolis. Aware that the chemical company was to make a sale of chloroform to Armstrong, the agent obtained Hawkin's permission to attach a beeper tracking device to a drum of chloroform. The agent did not obtain a warrant or court order authorizing the monitoring of the beeper. If the fourth amendment restrictions applied, there were no exigent circumstances exempting the police from the ordinary requirement of getting a warrant.

The chloroform was put into an automobile and, by following the beeper's signals, the agents were able to determine that the chloroform drum came to rest at the cabin of Leroy Knotts in Wisconsin. After making visual observations of the cabin, the officials obtained a search warrant for the cabin. During the subsequent search with the warrant, the agents found a clandestine drug laboratory and arrested Knotts. The issue in *United States v. Knotts* was not fourth amendment satisfaction. The only issue was the threshold issue of whether the fourth amendment covered the location or movement of the drum of chloroform on public streets, public roads and open fields. If the use of the beeper was permitted, the warrant was good. If not, the warrant was invalid and the evidence should be suppressed. The Court said:

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned. . . .

But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the "open fields."

Visual surveillance from public places along Petschen's route or adjoining Knotts' premises would have sufficed to reveal all of these facts to the police. The fact that the officers in this case relied not only on visual surveillance, but also the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case. . . .

. . . .

Respondent specifically attacks the use of the beeper insofar as it was used to determine that the can of chloroform had come to rest on his property at Shell Lake, Wis. He repeatedly challenges the "use of the beeper to determine the location of the chemical drum at Respondent's premises," he states that "[t]he government thus overlooks the fact that this case involves the sanctity of Respondent's residence, which is accorded the greatest protection available under the Fourth Amendment." . . .

. . . .

We thus return to the question . . . did monitoring the beeper signals complained of by respondent invade any legitimate expectation of privacy on his part? . . . [W]e hold it did not. Since it did not, there was neither a "search" nor a "seizure" within the contemplation of the Fourth Amendment. . . .⁴³

By contrast, the monitoring of another beeper tracking device in *United States v. Karo*⁴⁴ did engage the gears of the fourth amendment. After a Drug Enforcement Administration agent learned that Karo ordered fifty gallons of ether from a government informant, supposedly to be used to extract cocaine from clothing that had been imported into the United States, the government obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. With the informant's consent, federal agents substituted their own can containing a beeper for one of the cans in the shipment. Thereafter, they saw Karo pick up the ether from the informant, followed Karo to his house, and determined by using the beeper that the ether was inside the house. The agents eventually obtained a warrant to search the house based in part by the

43. *Id.* at 281-85 (citations omitted).

44. 468 U.S. 705 (1984).

information gained by use of the beeper. Karo was arrested and indicted for various offenses relating to the cocaine.

In *Knotts*, the location of a person or a thing in public was simply not protected by the fourth amendment. If one's location is not within the amendment's coverage in the first place, it makes no difference whether the method of observation is primitive (naked eye or ear) or technologically sophisticated (beeper tracking device). In *Karo*, the beeper signals emanated from within constitutionally-protected areas. Since private homes are covered by the fourth amendment, that amendment must be satisfied before signals may be monitored to discover what is going on inside these homes. The police activity was the same in both cases. The only difference was in constitutional coverage: the home is covered, the street is not.

The fundamental point to be made is that when the fourth amendment is not applicable, it does not have to be satisfied. Indeed, where it is not applicable, it cannot be satisfied; nor can it be violated. In order, for instance, to look for evidence of crime on streets and sidewalks, in sewers and gutters, under rocks, and in hollow logs, a police officer does not need probable cause. The officer does not need particularly to describe anything; and may rummage about in field and stream to heart's content. Exigency has no meaning; the officer may eschew warrants simply because the officer hates typing. Nor is good faith of any fourth amendment consequence; the officer may be looking malevolently for the evidence that will ruin a political rival or consign a landlord to the Bastille. To be sure, the due process clause generally or the equal protection clause might be engaged but not the fourth amendment. Its criteria cannot be violated where its criteria do not reach. As for warrants, a police officer could not get one even if one was asked for:

Officer: "Judge! Judge! I want a warrant to look for Easter eggs in the park."

Judge: "Officer, get out of here! You don't need a warrant to look for Easter eggs in the park. I have no power to permit you to go to the park or to prohibit you from going to the park. You go to the park because it pleases you to go to the park. Whether you go and what you do while you're there is not my business nor the Constitution's business nor the business of any court in this land.

You're grown up and we can't tell you what to do beyond the fourth amendment's reach any more than we can tell you what magazines to read, who to date and what to eat for breakfast. Get out!"

II. INAPPLICABILITY AS TO THE TRESPASSER

The archetype for fourth amendment inapplicability as to the person of the trespasser is *Burdeau v. McDowell*.⁴⁵ In 1921, Joseph Burdeau, a Special Assistant to the Attorney General of the United States, was about to present to a Pennsylvania grand jury a wide variety of private books, papers, and memoranda belonging to J.C. McDowell as evidence of mail fraud on the part of McDowell. McDowell demanded the return of his documents.

The district court ruled in favor of McDowell. The court found that all of the private papers and memoranda "had been stolen from the offices of the petitioner at rooms numbered 1320 and 1321 in the Farmer's Bank Building, in the city of Pittsburgh."⁴⁶ Two safes were blown open from which much of the evidence was recovered. McDowell's private "desk was forced open, and all the papers taken from it."⁴⁷ The court ordered the return of the private property "solely upon the ground that the Government should not use stolen property for any purpose after demand made for its return."⁴⁸ The judge concluded that "there had been a gross violation of the fourth and fifth amendments."⁴⁹

In his dissenting opinion, Justice Brandeis posed the issue before the Supreme Court: "Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so?"⁵⁰ The Supreme Court answered, "Yes." The Court held that the fourth amendment is a protection only against government and the agents of government and is simply inapplicable to private persons:

45. 256 U.S. 465 (1921).

46. *Id.* at 471.

47. *Id.* at 473.

48. *Id.* at 472 (quoting the district court).

49. *Id.*

50. *Id.* at 476 (Brandeis, J., dissenting).

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; . . .

In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another.⁵¹

The Supreme Court did not approve of the wrongful acts of private persons and assumed that appropriate redress was available through substantive civil and criminal law: "We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."⁵²

The misdeeds of private persons, however, be they crime or tort or both, are simply not the stuff with which the fourth amendment is concerned and do not, therefore, engage the gears of the exclusionary rule:

We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. . . .

[W]ithout a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an in-

51. *Id.* at 475.

52. *Id.*

criminatory character.⁵³

At first glance, *Burdeau v. McDowell* is a shocker. Only by standing back and getting a panoramic overview can we appreciate the difference between the private wrong, involving frequently a bad end as well as bad means, and the governmental wrong, involving generally bad (essentially overzealous) means to what is thought to be a good end. Only with the long view can we appreciate the differing natures of the sanctions available to deal with the two types of wrongs. Only by looking down on the whole panorama are we reminded that the fourth amendment is but a part of the Bill of Rights and that the entire Bill of Rights is, by definition, a set of limitations upon government as government. To acknowledge that the Bill of Rights is inapplicable for their correction is not to condone private wrongs.

We are protected from each other's depredations by the traditional substantive law, civil and criminal, which we have erected over the centuries to regulate people's interrelationships with other people. If one breaks into my house and steals evidence to be used against me, I go to the local prosecutor or to the grand jury. I complain of the crimes of burglary and larceny. I sue civilly for unlawful conversion or trespass. If a private department store detective arrests me wrongly or charges me wrongly, I sue the store for false arrest, for false imprisonment, for malicious prosecution. Judgments running into the hundreds of thousands of dollars are routine for such private wrongs.

In the years that followed *Burdeau v. McDowell*, the Supreme Court regularly and unanimously recognized that the fourth amendment regulated only the conduct of governmental agents and not that of private persons.⁵⁴ The 1980 decision of *Walter v. United States*⁵⁵ involved the obvious misdelivery by a private carrier of twelve cartons of pornographic film. The employees of the private corporation that received the cartons opened the cartons and opened the boxes inside the cartons, notwithstanding the fact that there clearly had been a misdelivery. The Supreme Court concluded that had governmental

53. *Id.* at 476.

54. See *Smith v. Maryland*, 442 U.S. 735 (1979); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Irvine v. California*, 347 U.S. 128 (1954).

55. 447 U.S. 649 (1980).

agents been guilty of such conduct, the searches and seizures involved would clearly have been unreasonable.⁵⁶ Because in this case, however, the actions were those of private persons, the fourth amendment did not apply. The prosecution was not, therefore, prohibited from using the evidence at the subsequent trial for the unlawful shipping of pornography in interstate commerce: "It has, of course, been settled since *Burdeau v. McDowell*, . . . that a wrongful search or seizure conducted by a private party does not violate the fourth amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully."⁵⁷

*United States v. Jacobsen*⁵⁸ involved the deliberate opening of a suspicious-looking package and the discovery of a white powder, that was ultimately determined to be cocaine, by employees of a private freight carrier. The freight carrier turned the evidence over to federal authorities and a conviction was obtained. In holding that the opening of the package by employees of a private corporation did not represent a fourth amendment violation, the Supreme Court pointed out: "This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' "⁵⁹

The line between "state action," covered by the fourth amendment's commandment to be reasonable, and "private action," not so covered, is not always easy to determine. Although the Supreme Court has yet to speak upon the subject, some state and lower federal courts have held that private detectives are not within the coverage of the fourth amendment even though they are certified and licensed to do business by the state.⁶⁰ By the same token, searches and seizures carried out by private persons at the request of the police or in

56. *Id.* at 657.

57. 447 U.S. at 656.

58. 466 U.S. 109 (1984).

59. *Id.* at 113 (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

60. For a collection of such cases see Annotation, *Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 567 (1971).

cooperation with the police have been held to be "state action," because the private persons are in those circumstances deemed to be agents of the police.⁶¹

A particularly troubling problem has been that of whether a public school teacher or other public school employee comes under the umbrella of "state action" for purposes of fourth amendment coverage. In the 1985 case of *New Jersey v. T.L.O.*,⁶² this problem was addressed. A high school teacher noticed two girls holding lit cigarettes in the girls bathroom and escorted both girls to the principal's office. When questioned by the principal, one of the girls denied smoking. The principal asked her for her purse and opened it to find a pack of cigarettes and a package of papers to roll cigarettes. Based on the principal's knowledge, he assumed the rolling papers were for manufacturing marijuana cigarettes. He looked further into the purse and found other paraphernalia and a list of the girl's sales of marijuana to other students. She was charged and found to be delinquent. The motion to suppress the evidence of the marijuana was upheld by the New Jersey Supreme Court and the state appealed.⁶³

The Supreme Court concluded that the search of a student's pocketbook by a public school vice principal sufficiently represented "state action" to engage the gears of the fourth amendment: "In determining whether the search at issue in this case violated the fourth amendment, we are faced initially with the question whether that amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does."⁶⁴

61. See, e.g., *United States v. Klopfenstine*, 673 F. Supp. 356 (W.D. Mo. 1987) (search by landlord under the direction of the police constituted a violation of the fourth amendment). See generally *United States v. Mekjian*, 505 F.2d 1320 (5th Cir. 1975).

62. 469 U.S. 325 (1985).

63. *Id.* at 330.

64. The Court also explained that it

has never limited the amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the fourth amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau v. McDowell*. Accordingly, we have held the fourth amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara v. Municipal Court*; Occupational Safety and Health Act inspector, see *Marshall v. Barlow's, Inc.*, and even firemen entering privately owned premises to battle a fire, see *Michigan v. Tyler*, are all subject to the restraints imposed by the fourth amendment. As we observed

The Court has held school officials are subjected to both the first amendment⁶⁵ and the due process clause of the fourteen amendment.⁶⁶ The Court in *New Jersey v. T.L.O.* stated that “[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourteenth Amendment.”⁶⁷

III. INAPPLICABILITY AS TO THE VICTIM

Another variety of fourth amendment applicability is the coverage of the person of the defendant. Even where the place searched is clearly under the coverage of the fourth amendment and even where the warrantless trespassers are clearly law enforcement agents of government, there may nevertheless be fourth amendment inapplicability in a given case for the reason that the defendant was not a person covered by the fourth amendment protection and, therefore, lacks standing to object. The threshold issue of whether a defendant has or does not have fourth amendment standing has no correlation with the distinct issue of whether the defendant could or could not prevail on the fourth amendment merits. Standing is the very passkey to the forum of the suppression hearing. If one has standing to litigate the fourth amendment merits, that tells us nothing about whether that person will win or lose upon the merits. Similarly, one who utterly lacks standing to litigate the fourth amendment merits might well have prevailed upon the merits if the merits had been material. As one commentator has pointed out:

The essential attribute of the standing determination has always been that it was a decision whether to decide—a determination of whether the validity of the challenged government action should be passed on for this [person]. A denial of standing did not mean the legality of the [govern-

in *Camara v. Municipal Court*, supra, “[t]he basic purpose of this amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”

Id. at 335.

65. *Id.* at 336 (citing *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)).

66. *Id.* (citing *Goss v. Lopez*, 419 U.S. 565 (1975)).

67. *Id.* at 336–37.

ment's] action was upheld, that question was not reached. A grant of standing did not mean that [the individual] would prevail on the merits, even if he sustained his factual burden; when the merits were considered, the [government's] legal position might be sustained.⁶⁸

Lack of standing in a defendant to raise the issue of the fourth amendment merits is an instance of fourth amendment inapplicability as to that defendant. To say that there is no standing is another way of saying that the defendant was not covered by the fourth amendment protection. The defendant may not, therefore, litigate whether that protection was violated. To the extent to which there is a valid dichotomy between "the fourth amendment inapplicable" and "the fourth amendment satisfied," the question of standing deals with applicability and not with compliance.

Standing to litigate a fourth amendment issue is an instance of the broader phenomenon of standing requirements generally. American courts are, and always have been, inundated with more litigation than they can possibly handle. As a result, there simply is no time left over at the end of the day to resolve questions of merely academic interest. From the beginning, therefore, courts have been jurisdictionally limited to dealing with "live cases and controversies."⁶⁹ In the fourth amendment context, if a prospective litigant has a fourth amendment right that has arguably been violated, that litigant may litigate the constitutional propriety of the police behavior. If, on the other hand, the litigant has no personal fourth amendment right (is not the aggrieved party), that prospective litigant will not be permitted to litigate vicariously the violation of someone else's fourth amendment right. A challenge to standing is, in simplest terms, the device by which busy courts demand of a would-be litigant, "What business is it of yours?" If the prospective litigant can satisfy the court that it is the litigant's fourth amendment interest that was allegedly violated, then it is that litigant's business and the courtroom forum will be made available. If it is not that prospective litigant's personal fourth amendment right but rather the fourth amendment right of someone else that is involved, then the violation or

68. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 669 (1973).

69. U.S. CONST. art. III, § 2.

satisfaction of the right is not the business of that would-be litigant. In the language of the fourth amendment, we say that that would-be litigant lacks standing to object.

Prior to 1960, the requirements for fourth amendment standing were rigidly austere. If challenged to show standing,⁷⁰ the defendant was required to show some kind of proprietary or possessory interest in either the place searched or the thing seized. More subtle later analysis has indicated that the defendant will be, perhaps, required to show an interest both in the place searched and also in the thing seized to have the fullest measure of standing to object.⁷¹ Until 1960, this proprietary standing was the only variety of standing recognized by the Supreme Court.

In that year, the Supreme Court decided the case of *Jones v. United States*.⁷² Jones was charged with having purchased, sold, dispensed and distributed narcotics in violation of a federal statute. His conviction required proof of possession of the narcotics. The evidence against Jones was found pursuant to a search by Federal narcotics officers in a Washington, D.C. apartment. Upon the search Jones admitted that some of the drug paraphernalia was his and that he was living in the apartment. Prior to trial, Jones moved to suppress the evidence obtained through the execution of the search warrant on the ground that the warrant had been issued without a showing of probable cause. The government challenged Jones' standing to make this motion because Jones alleged neither ownership of the seized articles nor an interest in the apartment. Jones testified that the apartment belonged to a friend, Evans, who had let him use it. He had a key to it. He also testified that he had a suit and shirt at the apartment and he paid nothing for the use of it.⁷³ On the basis of lack of standing to make the motion, the district court denied Jones' motion to suppress the evidence. The court of appeals affirmed.

70. *Steagald v. United States*, 451 U.S. 204 (1981), made it clear that there is an initial obligation of the State to raise a challenge to the defendant's standing. If the State fails to raise a timely challenge and the court goes on to consider the fourth amendment issue on the merits, the State will not be permitted to interpose the standing issue at a later date. Since the primary purpose of the standing requirement is to conserve the time and energy of the court, once that time and energy have been consumed, there is no longer any purpose in considering the standing question.

71. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

72. 362 U.S. 257 (1960).

73. *Id.* at 258-59.

The Supreme Court, in overturning the court of appeals, dramatically liberalized the law of standing by recognizing two other sets of circumstances that would entitle one allegedly aggrieved by a search and seizure to reach the fourth amendment merits. The first of these new varieties of standing, dealing primarily with the sub-issue of the thing seized, was called "automatic standing." The second, dealing primarily with the place searched, extended the right to challenge the police entry into a given place from those with a proprietary or possessory interest in the place to all of those legitimately on the premises, by way of being guests, licensees, or invitees of the host. This variety of standing is sometimes called "derivative standing" because the right to challenge is not inherently in the guest in the first instance but derives through the host to the guest. As a result, such an entitlement to reach the fourth amendment merits on the part of a guest, licensee, or invitee may never be greater than that of the host and may always be defeated by the host, as in a case where the host would consent to a police entry and a police search.

"Automatic standing" was deliberately designed by the Supreme Court to remove a defendant from the cruel horns of a dilemma.⁷⁴ The dilemma was frequently referred to as "Learned Hand's dilemma," taking its name from the great judge who presided over the United States Court of Appeals for the Second Circuit during the 1930s and 1940s. The dilemma was that the very words a defendant was required to speak to satisfy his standing requirement on the fourth amendment suppression motion could frequently come back to haunt that defendant on the merits of guilt or innocence. If a defendant wanted to challenge the constitutionality of a search and seizure, that defendant was required, if his standing was challenged, to assert, in effect, "the house wherein the contraband was found was mine" or "the contraband that was seized was mine." The defendant would thereby acquire standing to object and if the defendant prevailed on the suppression motion, all was well. If the defendant lost the suppression motion, however, and the case went forward to trial, the very acknowledgement of an interest in the contraband or an interest in the place wherein the contraband was found could be used by the prosecution as proof of the defendant's guilt.

74. *Id.* at 263-64.

In the case of *Connolly v. Medalie*,⁷⁵ in 1932, Judge Hand articulated the dilemma:

Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.⁷⁶

The *Jones* opinion set out explicitly to remove a defendant from the horns of the dilemma. The “automatic standing” that was created by that opinion applied in any case where the defendant was charged with a crime of unlawful possession of contraband, a crime wherein the very possession of the items seized is the heart of the offense. The filing of the charges automatically confers upon the defendant an entitlement to litigate the constitutionality of the search that led to the contraband and the seizing of the contraband. The *Jones* solution, however, caused problems for prosecutors and defense attorneys alike. Defense attorneys accused “automatic standing” of being but half a loaf. They were disappointed that it did not reach further afield to cover crimes where the introduction of the physical evidence was part of the proof but not as fully dispositive as it would be in a case charging simple possession. The prosecutors, on the other hand, thought that “automatic standing” went too far, for if a defendant charged with unlawful possession was automatically entitled to challenge the search of a particular place, this might entitle a car thief to challenge police entry into the stolen car or might entitle a burglar to challenge police entry into the home being burglarized. The “automatic standing” of *Jones* was essentially a primitive effort to solve a problem, an effort that created as many new problems as it solved.

The Supreme Court’s 1968 decision of *Simmons v. United States*⁷⁷ was a more sophisticated, second-generation effort that solved the problem without creating new problems. In *Simmons*, the defendant Garrett was charged with bank robbery.

75. 58 F.2d 629 (2d Cir. 1932).

76. *Id.* at 630.

77. 390 U.S. 377 (1968).

During the search of a codefendant's mother's house, physical evidence used in the bank robbery, including a suitcase, was found in the basement and seized. In an effort to establish his standing to assert the illegality of the search, Garrett testified at the suppression hearing that the suitcase was similar to one he owned and that he was the owner of the clothing discovered inside the suitcase. Garrett's motion to suppress was denied and his testimony was admitted into evidence against him. The Supreme Court reversed.

The *Simmons* decision held that a defendant was free to take the stand at a pretrial hearing to litigate constitutional issues involving the admissibility of evidence without fear that anything said on that limited issue could be used by the prosecution in the later case on guilt or innocence. That right to testify freely on the preliminary question without fear that the testimony could later come back to haunt the defendant at the trial on the merits, in effect, removed the defendant from the "horns of the dilemma" by removing the dilemma. The *Simmons* decision did not explicitly mention the subject of "automatic standing" but its implicit repercussions were obvious. Since "automatic standing" was simply a rule devised to solve a problem, the rule would disappear when the problem disappeared. Since the purpose for "automatic standing" no longer existed, "automatic standing" ceased to exist with the disappearance of its very reason for being.

On several occasions in the 1970s, the Supreme Court, in dicta, acknowledged this possibility but declined to make a definitive ruling because the problem was not squarely before the Court on those occasions.⁷⁸ In 1980, however, the issue came squarely before the Court in the case of *United States v. Salvucci*.⁷⁹ John Salvucci and Joseph Zackular were charged with unlawful possession of stolen mail in violation of a federal statute. The twelve checks which formed the basis of the indictment had been seized by the Massachusetts police during

78. See *Brown v. United States*, 411 U.S. 223 (1973) (Court reserved question of "automatic standing" for a case where possession at the time of the contested search and seizure was an essential element to the offense charged); *Rakas v. Illinois*, 439 U.S. 128 (1978).

79. 448 U.S. 83 (1980). See also *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (defendant drug dealer lacked standing to contest search of woman's purse because he had no legitimate or reasonable expectation of freedom from intrusion into the purse).

the search of an apartment rented by Zackular's mother. The search was conducted pursuant to a warrant. Salvucci filed a motion to suppress the checks on the ground that the affidavit supporting the application for the search warrant was inadequate to demonstrate probable cause. The district court granted the motion and ordered that the checks be suppressed. The Government appealed the ruling contending that Salvucci lacked standing to challenge the constitutionality of the search. The court of appeals affirmed, holding that Salvucci was not required to establish a legitimate expectation of privacy in the premises searched or the property seized because he was entitled to "automatic standing" under *Jones*.⁸⁰ In reversing the Supreme Court acknowledged that since the reason for "automatic standing" no longer existed, "automatic standing" had ceased to exist as well.⁸¹ Thus, the "automatic standing" that was born in 1960, was at least moribund as of 1968 and was the subject of an official obituary as of 1980.

The other new variety of standing that was created by the *Jones* decision was derivative standing with respect to the place searched. Within the confines of constitutionally protected areas, legitimate visitors as well as official property owners were secure from fourth amendment intrusions. In the initial wake of the *Jones* decision this variety of standing could be determined in an almost mechanistic fashion. If the host would have standing to object, anyone else legitimately on the premises (regardless of the type of premises involved) would similarly seem to have standing to object.

The 1978 decision of *Rakas v. Illinois*,⁸² however, indicated that this variety of standing would be settled on an ad hoc basis rather than according to some bright-line formula. In *Rakas v. Illinois*, the defendant was a passenger in an automobile owned by and driven by someone else. The automobile was subjected to a warrantless police search, in the course of which evidence was recovered which helped to prove the defendant guilty of armed robbery. Although the defendant attempted to litigate the constitutionality of the warrantless automobile search, the trial court and ultimately the Supreme Court held

80. *Id.* at 86.

81. *Id.* at 88-89.

82. 439 U.S. 128 (1978).

that Rakas had no standing to object to the search of the car.⁸³ Rakas, to be sure, was legitimately in the car just as he could have been a legitimate guest in someone else's apartment. The distinguishing factor, however, was that the automobile, although constitutionally protected by the fourth amendment, enjoys a lesser expectation of privacy. As a result, a "mere passenger" in an automobile, without more being shown, does not possess the requisite standing to raise the fourth amendment issue that a "mere guest" in a home, enjoying a higher expectation of privacy, might well possess.

The Court did not hold that passengers in automobiles are necessarily bereft of fourth amendment protection. If the passenger could show some additional factor, such as being a member of the car owner's family or being in the car for a three week, cross-country trip with suitcases in the trunk, such an additional showing might well be enough to establish standing. *Rakas* simply held that status as a "mere passenger" was not enough to cross the standing threshold.⁸⁴

Since 1980, the only Supreme Court decision to deal, even obliquely, with the question of standing was the 1983 decision of *United States v. Karo*.⁸⁵ *Karo* established that where a challenge to the admissibility of evidence is based upon the two-stage analysis known as the "fruit of the poisonous tree" doctrine, it is necessary for a defendant, whose standing is challenged, to show standing in both stages.⁸⁶ In that case, one defendant who had standing in a home from which a beeper signal was unconstitutionally monitored could not challenge the search of another home, as to which that defendant had no standing, even though the first beeper monitoring helped to establish the probable cause for the warrant to search the second home. Conversely, a codefendant, who had standing in the second home that was searched pursuant to a warrant, could not argue that the probable cause for the warrant was tainted by an earlier unconstitutional monitoring of a beeper signal from the first home because that codefendant had no standing in the first home that was unconstitutionally

83. *Id.* at 148-50 (party asserted neither a property or possessory interest in area searched nor a proprietary interest in property seized).

84. *Id.* at 148-49.

85. 468 U.S. 705 (1984).

86. *Id.* at 707.

monitored.⁸⁷

When all is said and done, the complicated subject of fourth amendment standing has nothing to do with the fourth amendment merits themselves. It deals only with the entitlement of a defendant to litigate those merits.

IV. WAIVER OF FOURTH AMENDMENT PROTECTION/CONSENT

The subject of consensual searches will only be briefly mentioned because many commentators and most appellate courts classify consensual searches as an exception to the warrant requirement. In terms of a clear conceptualization of the fourth amendment, such a classification seems inappropriate. The warrant requirement and all of its exceptions are ways of satisfying the fourth amendment, when the fourth amendment is applicable and needs satisfaction. A consensual search seems to be more logically an instance of the fourth amendment inapplicable.

All constitutional rights, including a fourth amendment right, may be waived. In a consent search situation, there is nothing in the external circumstances that permits the police to do anything by way of searching or seizing. The consent is an act of grace on the part of the consenting party. The consenting party, in effect, says, "I recognize that you, Officer, have no authority—either under a warrant or under any of the exceptions to the warrant requirement—to carry out the search you seek. I have the absolute right to refuse consent and to insist upon my fourth amendment protection. As an act of grace, however, I voluntarily waive that right and permit you to do what you would otherwise not be constitutionally empowered to do. By voluntary waiver, I have yielded up my fourth amendment right."

As with other instances of threshold applicability, the ultimate factual issue of whether a valid consent was given is an objective one, depending upon all of the circumstances as they are fully developed at a suppression hearing. The threshold applicability of the fourth amendment, as contrasted with the satisfaction of the fourth amendment, is not measured from the subjective point of view of the searching officer. The officer's reliance upon appearances is a factor in measuring the

87. 468 U.S. at 719-21.

reasonableness of the officer's subsequent behavior. That is a critical factor in measuring fourth amendment satisfaction, because the fourth amendment forbids unreasonable searches and permits reasonable ones. The reasonableness which is the core of the fourth amendment merits, on the other hand, is not a factor on the issue of fourth amendment coverage.

In dealing with consensual searches, the key issue is frequently the voluntariness of the consent (the voluntariness of the waiver of the right). Following a valid waiver, however, the resulting consensual search can probably be better conceptualized as an instance of the fourth amendment inapplicable (voluntarily rendered inapplicable) rather than as an instance of the fourth amendment satisfied. Since, however, consensual searches are generally classified as exceptions to the warrant requirement, the topic should be considered in a discussion of fourth amendment satisfaction.

V. WHEN THE FACTS DON'T FIT THE MODEL: THE REASONABLE EXPECTATION OF PRIVACY

The varieties of coverage already discussed—coverage of the place, coverage of the searcher, coverage of the defendant and the waiver of the coverage—encompass the overwhelming majority of situations involving fourth amendment applicability. There are sometimes, however, unusual factual patterns that do not fit the paradigm and it is difficult to determine from the facts if there is a fourth amendment protection. The Supreme Court's 1967 decision of *Katz v. United States*⁸⁸ provided the formula for handling these questions of fourth amendment applicability.

In dealing with the issue of the geographic coverage of the fourth amendment, we have already discussed *Katz*'s central holding that an actual physical penetration into a constitutionally protected perimeter is no longer required in order to engage the gears of fourth amendment protection.⁸⁹ Although many persons had read *Katz*'s phrase about the fourth amendment protecting "people, not places" overbroadly to suggest that the fourth amendment had moved from inside a protected area to the broad outside, it ultimately became clear that the import of the phrase was to enhance the quality of the protec-

88. 389 U.S. 347 (1967).

89. See *supra* text accompanying notes 21-44.

tion inside the traditionally protected area. It was not the structural integrity of the building material that was being safeguarded but the privacy of the person inside the constitutionally protected area.

In the years since its initial promulgation, *Katz* has become the most doctrinally significant case on the subject of fourth amendment coverage. As it has been analyzed, developed and applied to a variety of situations, the concurring opinion of Justice Harlan has ripened into the prevailing law on the subject.⁹⁰ It was Justice Harlan who devised the phrase “the reasonable expectation of privacy”⁹¹ (sometimes phrased as “justifiable expectation of privacy”⁹² and sometimes phrased as “legitimate expectation of privacy”⁹³). That phrase has become the formula for determining fourth amendment coverage. Justice Harlan also developed a two-fold analysis. It must first be determined whether a defendant subjectively had an actual expectation of privacy.⁹⁴ Even if that is the case, it must still be determined that expectation of privacy is one that society is prepared to recognize as reasonable.⁹⁵ The traditional criteria for determining fourth amendment coverage prior to the *Katz* decision continue to serve that function. They have become, however, the sub-criteria for determining whether an expectation of privacy was reasonable in the objective sense, that is, one that society was prepared to recognize as reasonable. The heart of Justice Harlan’s concurrence points out:

As the Court’s opinion states, “the Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a

90. *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) (“Justice Harlan explained the Court’s analysis in terms which now represent the standard application of *Katz*: whether the government has intruded upon the individual’s reasonable expectation of privacy.”); Comment, *A Privacy-Based Analysis for Warrantless Aerial Surveillance Cases*, 75 CALIF. L. REV. 1767, 1770 (1987) (“Justice Harlan’s formulation of a reasonable expectation of privacy has subsequently been adopted by the Court as the essence of *Katz*.”).

91. 389 U.S. at 360.

92. *United States v. White*, 401 U.S. 745, 752 (1971) (Court speaks of a “justifiable expectation of privacy” in terms of the principles announced in *Katz*).

93. *Rakas v. Illinois*, 439 U.S. 128, 143–44 n.12 (Court defines a “legitimate expectation of privacy” as more than a subjective expectation of not being discovered but as one which society is prepared to recognize as “reasonable” under *Katz*).

94. 389 U.S. at 361.

95. *Id.*

"place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

The critical fact in this case is that "[o]ne who occupies it, [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume" that his conversation is not being intercepted. The point is not that the booth is "accessible to the public" at other times, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.

In *Silverman v. United States*, we held that eavesdropping accomplished by means of an electronic device that penetrated the premises occupied by petitioner was a violation of the Fourth Amendment. That case established that interception of conversations reasonably intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required. . . . In *Silverman* we found it unnecessary to re-examine *Goldman v. United States*, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider *Goldman*, and I agree that it should now be overruled. Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.⁹⁶

CONCLUSION

A large percentage of fourth amendment litigation involves the issues discussed above. Not one of them, however, has the

96. 389 U.S. at 361-62 (footnote and citations omitted).

remotest thing to do with the ultimate substance of the fourth amendment protection itself. They deal exclusively with the threshold question of whether the fourth amendment is even involved. Only if it is, do the actual requirements of the fourth amendment become material. Where the fourth amendment is found, on threshold analysis, to be inapplicable, its requirements and any consideration of whether those requirements were satisfied or violated is utterly immaterial. The two key questions remain: (1) Is it applicable? (2) Has it been satisfied? Even more fundamental than the two questions themselves is the direction lurking, in parentheses, between: (Do not go on to Question #2 unless the answer to Question #1 is, "Yes.").

